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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re: NORTHWEST SENIOR HOUSING CORPORATION, *et al*.[1] Debtors.	Chapter 11 Case No. 22-30659 (MVL)
Leif M. Clark, Trustee of the Edgemere Litigation Trust Plaintiff, v Intercity Investment Properties, Inc., and Kong Capital LLC, Defendants.	Adv. Pro. No. 22-03040 (MVL)

DEFENDANTS' REPLY TO THE RESPONSE OF LIFESPACE COMMUNITIES, INC.'S TO DEFENDANTS' MOTION TO COMPEL PRODUCTION OF THE LIFESPACE COMMUNICATIONS AND GRAYROBINSON COMMUNICATIONS

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are Northwest Senior Housing Corporation (1278) and Senior Quality Lifestyles Corporation (2669). The Debtors' mailing address is 8523 Thackery Street, Dallas, Texas 75225.

Defendants moved for, among other things, production of the Lifespace Communications and the GrayRobinson Communications.[1] The Lifespace Communications and GrayRobinson Communications were withheld first by Edgemere and now by Plaintiff based on misguided assertions of attorney-client privilege and work product protection. Lifespace alone responded, and its response shows that the documents were, and are, improperly withheld.

I. Disclosure of the Lifespace Communications waived the attorney-client privilege.

Lifespace does not dispute that it furnished all the Lifespace Communications to Edgemere's counsel post-petition. Lifespace's chief argument is that Tex. R. Evid. 503(b)(1)(C) excepts the disclosure from the general privilege waiver rule because Lifespace and Edgemere were aligned *in this adversary proceeding*. More particularly, Lifespace advances that "the underlying chapter 11 case" was "a ***different*** legal proceeding" from this adversary proceeding and that the "fact Lifespace may have engaged in arms' length negotiations with Plaintiff or was a creditor in a different proceeding does not undermine the common interest it shares with Plaintiff in *this* Adversary Proceeding." (Emphasis in original).

Lifespace's argument is self-defeating—it confirms that the disclosure waived privilege because the waiver exception embodied in Texas Rule of Evidence 503(b)(1)(C) applies only if the disclosing party and the receiving party[2] each are *parties* to the same "pending action." Lifespace insists that its disclosure was made as part of this adversary proceeding, that this adversary proceeding is distinct from the bankruptcy case, and that Lifespace is not (and never has

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[1] Capitalized terms not defined herein have the definitions ascribed to them in Defendants' *Supplemental Brief Regarding the Lifespace Privilege Waiver and GrayRobinson Communications*, ECF 434. The term Lifespace Communications means those communications between Lifespace and its outside counsel; the term "GrayRobinson Communications" means those communications between GrayRobinson and Edgemere, Lifespace, and/or Edgemere or Lifespace's respective professionals.

[2] More particularly, the Rule requires that disclosure be made to the *lawyer* for another party in a pending action or that lawyer's representative—not to the party itself.

been) a party to this adversary proceeding. Consequently, the disclosure was not made "to a lawyer representing *another party* in a pending action or that lawyer's representative," such that Texas Rule of Evidence 503(b)(1)(C) could apply.

Case authorities support this plain language interpretation of Rule 503(b)(1)(C). In *In re XL Specialty Ins. Co.*, 373 S.W.3d 46 (Tex. 2012), an injured employee brought a "bad faith" action against his employer's worker's compensation insurer. The trial court ordered that communications between the insurer's attorney and the employer made during the underlying administrative proceeding were discoverable, and the insurer and employer petitioned for a writ of mandamus holding that such communications were covered by the attorney-client privilege, relying chiefly on Texas Rule of Evidence 503(b)(1)(C). The Texas Supreme Court agreed with the trial court and held that the communications were not covered by the attorney-client privilege.

The *In re XL* Court characterized Rule 503(b)(1)(C) as an "allied litigant doctrine" narrower in scope than the corresponding federal "common interest" doctrine, in that "Texas requires that the communications be made in the context of a pending action." 373 S.W.3d at 51-52. In "jurisdictions like Texas, which have a pending action requirement," the Court held, "no commonality of interest exists absent actual litigation." *Id.* at 52. "Accordingly," Texas's "privilege is not a 'common interest' privilege that extends beyond litigation" nor "is it a 'joint defense' privilege, as it applies not just to defendants *but to any parties to a pending action*." *Id.* (emphasis added).

The Court continued to hold that the communications at issue were not covered by Rule 503(b)(1)(C) because the insurer was not a party to a pending action: "no matter how common XL's [the insurer's] and Cintas' [the employer's] interests might have been, our rule requires that

the communication be made to a *lawyer or her representative* representing another party in a *pending action*." *Id.* at 54 (emphasis in original).

Shortly after *In re XL*, another Texas court applied *In re XL*'s holding to conclude that documents exchanged between defendants in a pending action, on the one hand, and a bank the plaintiff-borrower sought to have added as a defendant to that action, on the other hand, were not protected under Rule 503(b)(1)(C) although (as argued by the relators) the defendants and the bank had a "common interest" in the outcome of the pending litigation, the plaintiff's "bankruptcy proceeding," and a second lawsuit by the plaintiff. *In re Park Cities Bank*, 409 S.W.3d 859, 875 (Tex. App.—Tyler 2013, no pet.). The court rejected the assertion of privilege because the parties claiming privilege "did not apply the 'pending action' requirement of Rule 503." *Id.* Although the lawyer and lawyer representatives to the communications each represented parties to pending litigation, they were not parties to the *same* litigation, so the privilege claim failed. *Id.*

Perhaps the clearest statement of the limitations of Rule 503(b)(1)(C) comes from *Benson v. Rosenthal*, 2016 WL 3001129 *4 (E.D. La. May 25, 2016) in which the court held that "Texas case law indicates that [Rule 503(b)(1)(C)] protects only persons who are co-litigants, either plaintiffs or defendants, in the same pending action, not in separate cases." (Citing *XL*, *supra*). In short, the Texas Supreme Court, a Texas intermediate court of appeals, and a federal court applying Texas law each have concluded that for Rule 503(b)(1)(C) to apply, the disclosure at issue must be between those representing parties *to the same litigation*.

Here, Lifespace emphasizes that this adversary proceeding is "a ***different*** legal proceeding" from the underlying bankruptcy. At the same time, though, Lifespace concedes that it is not and never has been a party to this adversary proceeding. Consequently, Lifespace's own analysis compels that its disclosure of the Lifespace Communications to Edgemere waived privilege.

While that is dispositive of the privilege issue, there is yet another, second, basis for the same result. To be privileged, the disclosure of the communication must also have been made to "facilitate the rendition of professional legal services *to the client*," Lifespace. (Emphasis added). Disclosing the Lifespace Communications to Edgemere's counsel did not and could not facilitate the rendition of professional legal services to Lifespace. Lifespace had its own counsel and all the tools necessary to review the document set for privileged communications. Instead, it turned over the entire universe of documents—including the Lifespace Communications—to Edgemere for privilege review. But as explained in Defendants' opening briefing, Edgemere's counsel was engaged by the Estate and *could not* render legal services to Lifespace, a major Estate creditor.

Lifespace attempts feebly to argue that Rule 503(b)(1)(C) "does not require the party to which the privileged communications were disclosed to provide legal services to the disclosing party" but rather that the Rule requires only that "the disclosure be made 'to facilitate the rendition of professional legal services to the client,' even where the services are provided by the client's own counsel." The flaw in this argument is that it is entirely unsupported by any Texas authority or by any showing that the disclosure in fact facilitated the rendition of professional legal services to Lifespace by Lifespace's counsel. Quite to the contrary, there was no proper reason for the Lifespace Communications ever to have been disclosed to Edgemere; Lifespace could simply *not* have done that, and instead reviewed and provided a privilege log for the Lifespace Communications on its own.[3]

[3] According to Nick Harshfield's declaration submitted with Lifespace's response, Lifespace reasoned that disclosure of the Lifespace Communications to Edgemere's counsel was warranted because the discovery issued to Lifespace was "substantially similar" to that issued to Edgemere and that all responsive documents "were likely to reside" on Lifespace's server. Put otherwise, rather than undertake its own search for responsive documents and to review same for privilege, Lifespace elected instead to dump all responsive documents on Edgemere's bankruptcy counsel and shift the cost of privilege review from Lifespace to Estate professionals.

In summation, Lifespace's own arguments demonstrate that Rule 503(b)(1)(C) does not apply here. Lifespace further omits to advance any other reason why its post-petition disclosure of the Lifespace Communications to Edgemere did not waive privilege. Consequently, the claim of privilege should be overruled and the Lifespace Communications should be produced.

II. The Lifespace Communications are not protected work product.

Defendants have little quibble with Lifespace's characterization of the work product doctrine. The problem with Lifespace's position is its failure to support legal argument with facts.

Lifespace claims the Lifespace Communications were prepared in anticipation of litigation. Purportedly in support of that notion, Lifespace submits a declaration from Nick Harshfield. Harshfield's declaration nowhere states that he reviewed or knows the substance of the Lifespace Communications withheld as work product. Harshfield's declaration similarly nowhere states the Lifespace Communications withheld as work product were created in anticipation of litigation. Instead, he advances that Lifespace's counsel and Edgemere's counsel coordinated to identify and withhold "Lifespace Work Product"—a fact over which he claims no personal knowledge and to which he is incompetent to testify—but never avers that the documents ultimately withheld as work product are, in fact, among the documents he defines as "Lifespace Work Product."

Harshfield's failure to offer more specificity with respect to the "Lifespace Work Product" is fatal to Lifespace's claim for work product protection. ***First***, as explained in Defendants' opening briefing, affidavits providing only conclusory statements are insufficient to support a claim of work product protection.[4] ***Second***, some of the documents over which Lifespace claims

[4] *Colardo-Keen v. Rockdale Cnty., Georgia*, No. 1:14-CV-489-MHC, 2017 WL 4422349, at *2 (N.D. Ga. May 16, 2017); *see also Biegas v. Quickway Carriers, Inc.*, 573 F.3d 365, 381 (6th Cir. 2009); *Hunte v. Schneider Nat'l Carriers, Inc.*, No. 13-CV-2069-WSD, 2014 WL 3955723, at *4 (N.D. Ga. Aug. 13, 2014) ("The affidavit submitted by Jean Levash does not contain a factual basis for asserting the work-product privilege, and it is facially self-serving to support avoiding the production of required discovery."); *Freiermuth v. PPG Indus., Inc.*,

protection pre-date this litigation by well over a year and, particularly considering the allegation that Defendants *caused* Edgemere's bankruptcy through their acts and omissions in late 2021 and early 2022, it is unclear how such communications could have related to *this* litigation. As characterized by Lifespace at page 10 of its brief, the "Lifespace Work Product" purportedly was created in anticipation of "future litigation with Defendants," but nowhere does Harshfield or Lifespace explain how Lifespace's counsel was preparing for litigation with Defendants before any of Defendants' alleged acts or omissions even had taken place. Either the allegations of the Complaint are false or the assertions in Harshfield's declaration are false; as the entity seeking to withhold documents, it is Lifespace's burden to show which set of conflicting assertions is false.[5]

What is more, even if the Lifespace Communications were once protected work product, their disclosure to Edgemere destroyed any such protection. As explained in Defendants' prior briefing, disclosure of work product even to a *potential* adversary destroys the protection. And Lifespace and Edgemere certainly were at least *potential* adversaries for the reasons explained before (and for the additional reasons that will be shown through the evidence at the upcoming January 12, 2024 evidentiary hearing). Among those reasons: Lifespace was a major creditor and, during the one-year pre-petition period, had drained millions of dollars of liquidity from Edgemere in preferential or fraudulent transfers, as explained by Nick Harshfield during Edgemere's meeting of creditors under section 341(a).

Lifespace urges that the disclosure is irrelevant because it was made as part of the adversary proceeding, not as part of the underlying bankruptcy case. That distinction makes no difference in

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218 F.R.D. 694, 699 (N.D. Ala. 2003) ("An affidavit containing mere conclusory statements that a document was prepared for the purpose of obtaining legal advice will not suffice in meeting defendant's burden.").

5 *Hodges, Grant & Kaufmann v. U.S. Govt. Dept. of the Treasury, IRS*, 768 F.2d 719, 721 (5th Cir. 1985) ("The burden of establishing that a document is work product is on the party who asserts the claim").

this context and Lifespace cites no authority for the proposition. Edgemere and Lifespace were *potential* adversaries, and whether Edgemere may have advanced claims against Lifespace in this adversary proceeding, in another one, or through the claims administration process is wholly irrelevant. What matters under established Fifth Circuit precedent is that Lifespace disclosed the Lifespace Communications to Edgemere, a potential adversary. *See Ecuadorian Plaintiffs v. Chevron Corp.*, 619 F.3d 373, 378 (5th Cir. 2010) ("Although work-product immunity is not automatically waived by disclosure of protected material to third parties, disclosure does waive protection if it 'has substantially increased the opportunities for *potential adversaries* to obtain the information.'") (Emphasis added).

III. The GrayRobinson Communications are not privileged.

For many of the same reasons that the production of the Lifespace Communications are not properly withheld on privilege grounds, neither are the GrayRobinson Communications. Before explaining why, though, Defendants first note that Lifespace utterly fails to identify its standing to advance privilege or work-product protection over the GrayRobinson Communications when Lifespace was not GrayRobinson's client. In fact, Lifespace lacks standing to do so, and Lifespace's arguments about the GrayRobinson Communications may and should be rejected for that reason.

Even if Lifespace was a proper party to claim privilege over the GrayRobinson Communications, the GrayRobinson Communications are not and were never privileged.[6] Each pre-dates the commencement of this proceeding and, consequently, was not made by or to another

[6] To be clear, some of the GrayRobinson Communications are solely between GrayRobinson attorneys and some or all of Jesse Jantzen, Nick Harshfield, and Eddie Fenoglio. Given the multiple roles those individuals played and Lifespace and Edgemere's refusal to distinguish between which of those individuals' communications were on behalf of which entity, Lifespace has failed to demonstrate that those individuals were communicating in their capacities as Edgemere Board members here.

party in a *pending* action, as required for Texas Rule of Evidence 503(b)(1)(C) to apply—all as further addressed above with respect to Lifespace. Lifespace recognizes and acknowledges this requirement in its briefing, but inexplicably opines that the requirement is met because this adversary proceeding began *after* the GrayRobinson Communications occurred, effectively rewriting the Rule by substituting the word "impending" for the word "pending," and flatly contrary to *In re XL*, *Park Cities*, and *Benson*, *supra*. Lifespace identifies no authority holding that later-commenced litigation serves to cloak pre-litigation communications in privilege and none exists.

That issue—the absence of pending litigation—is dispositive. But, even if it was not, Lifespace's other arguments are equally infirm. Lifespace first argues that the Court already has concluded that the "related companies" exception to waiver applies to all communications between Lifespace and Plaintiff. That is both false and irrelevant. False because the Court's referenced order includes no such holding, and irrelevant because the GrayRobinson Communications are not with Plaintiff.[7] What is more, Lifespace cites no Texas authority even for the existence of a "related companies" exception to waiver under Texas law, much less facts supporting that it applies here.

Lifespace relatedly argues that Edgemere and its board are one and the same for purposes of privilege. The opinions Lifespace cites in support of this proposition are distinguishable, though. Here, unlike in Lifespace's cited cases, GrayRobinson's engagement letter specifies that its client was *only* the Edgemere Board, and *not* Edgemere itself. As explained in Defendants' earlier brief, "GrayRobinson's engagement letter specifies that the firm was to serve 'as counsel to the Edgemere Board and not to [Edgemere].'" Applying Lifespace's rule—that a company and its

[7] Lifespace presumably meant "Edgemere" when it referenced Plaintiff. Even so, the assertion still is irrelevant. GrayRobinson's client was the Edgemere Board, not Edgemere.

board are always the same for privilege purposes, even if the board engages separate counsel—would foreclose board counsel from providing confidential advice to its board client without that advice being equally available to company officers.[8]

Lifespace's argument also fails because even if it was right—that is, even if the Edgemere board and Edgemere are the same for privilege purposes—the GrayRobinson Communications still would be due to be produced because the "weight of authority . . . holds that a dissolved or defunct corporation retains no privilege." *S.E.C. v. Carrillo Huettel LLP*, No. 13 CIV. 1735 GBD, 2015 WL 1610282, at *2 (S.D.N.Y. Apr. 8, 2015). Here, Edgemere dissolved upon the plan effective date.[9] So too, therefore, did the privilege.

Lifespace finally argues, equally weakly, that the interests of Edgemere and its Board were at all times aligned. Aside from being immaterial given the absence of a pending action, this argument also is unsupported. The Board sought to engage its own counsel specifically to manage its own distinct duties. What is more, the Board's duties no longer ran to Edgemere, but to the creditor body at large. *Lifespace offers no facts to the contrary*, or at least no meaningful ones. The only support offered is Nick Harshfield's conclusory and untested statement in his new declaration that "the interests of the board of directors of Edgemere have been consistently aligned with the interests of Lifespace, Edgemere, and the Plaintiff in this Adversary Proceeding." Such conclusory assertions are not enough to carry Lifespace's burden, as the (improper) entity asserting privilege, to prove application of the privilege.

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[8] Such a rule would be wholly unworkable. Customary board functions include the selection and removal of key officers—like presidents and CEOs—and fixing their compensation. Under Lifespace's proposed rule, a board could not discuss those matters with its counsel without the very same officers about whom the advice pertains also having access to those communications.

[9] *See* Fourth Amended Plan, Bankr. Dkt. 1241, § 4.6 ("The Plan shall constitute a decree of dissolution with respect to each of the Debtors"); Notice of Effective Date, Bankr. Dkt. 1620 ("Therefore, June 13, 2023, is the Effective Date of the Plan").

The GrayRobinson Communications are not privileged. They are due to be produced.

IV. The GrayRobinson Communications are not protected work product.

As with the Lifespace Communications, Lifespace fails here to show that the GrayRobinson Communications are protected work product:

First, as identified above with respect to privilege, Lifespace has no standing to assert work product protection on behalf of GrayRobinson's client. ***Second***, as identified above with respect to the Lifespace Communications, Lifespace omits to advance *facts* supporting the application of the protection. ***Third***, as explained in Defendants' prior briefing and never refuted by Lifespace, the GrayRobinson Communications were freely available between and among Lifespace and Edgemere in addition to Edgemere's Board, even though Lifespace was a major creditor and future adversary at the time of the GrayRobinson Communications. In short, each of the GrayRobinson Communications was disclosed to *at least* a potential adversary, if not an actual one.

Any protection that may once have attached to the GrayRobinson Communications has been waived, Lifespace is not a proper party to assert the protection anyway, and the GrayRobinson Communications are due to be produced.

* * *

For the foregoing reasons, for those reasons set forth in Defendants' earlier briefing, and based on the additional facts that will be adduced during the January 12, 2024 evidentiary hearing, all claims of privilege or protection over the Lifespace Communications and the GrayRobinson Communications should be overruled, and those documents ordered to be produced immediately.

Dallas, Texas
January 8, 2024

/s/ Ryan C. Hardy

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CERTIFICATE OF SERVICE

I certify that on this 8th day of January, 2024, a copy of the foregoing was filed electronically with the Clerk of Court via ECF, which caused a copy of same to be transmitted to all counsel of record.

/s/ *Michael S. Held*
Michael S. Held